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No. 88-41

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

BOARD OF GOVERNORS OF STATE COLLEGES AND UNIVERSITIES, DR. GEORGE AYERS, DR. WILLIAM SUTTON, DR. BERLEAN BURRIS, BEATRICE GILMORE AND SANDRA WEBB-BOOKER,

Petitioners,

v.

ROBIN AKINS, ALBERTA BELL, ESTELLE BRADLEY, TANYA DAVIS, CAROLYN GRANT, NAOMI HAYS, TONI SADLER, MARGARET SAYERS, RHONDA SINGLETON AND BETTY WHITE,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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October 10, 1988

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ARGUMENT

I. THE DECISION IN *TORRES* V. *OAKLAND SCAVENGER COMPANY*, U.S. , 108 S.Ct. 2405 (1988) DOES NOT CONTAIN A "NEWLY ANNOUNCED RULE" AND DOES NOT REQUIRE A DISCUSSION OF RETROACTIVITY ESPECIALLY WHEN ITS HOLDING IS APPLIED TO PENDING CASES SUCH AS THIS CASE.

Respondents do not contest Petitioners' argument that the decision of the Seventh Circuit is in direct conflict with this Court's decision in *Torres* v. *Oakland Scavenger Company,* U.S. , 108 S.Ct. 2405 (1988) and that *Torres* was decided before the Seventh Circuit's decision became final. Instead, Respondents argue, incorrectly, that the appellate court followed a long standing position favoring liberal construction of notices filed under Federal Rule of Appellate Procedure 3(c). According to Respondents, a reversal of the decision below or a remandment of this case for reconsideration in view of this Court's decision in *Torres* would require retroactive application of that decision. Petitioners argue that retroactivity is not an issue in this action.

In a civil case, a change in the applicable law while a case is pending on direct review will normally be given effect. *Linkletter* v. *Walker,* 381 U.S. 618, 626-627, 85 S.Ct. 1731, 1735-1736 (1965), citing *United States* v. *Schooner Peggy,* 1 Cranch 103, 2 L.Ed. 49 (1801). Even newly declared constitutional rules of criminal procedure are applied retrospectively at least as to convictions not yet final when the rule is established. *United States* v. *Johnson,* 457 U.S. 537, 102 S.Ct. 2579 (1982). The decision of the appellate court in this case was not final. If the petition for certiorari in this case had been filed after the appellate court issued its opinion but before the decision in *Torres* was announced, then this Court would have either reversed or remanded this case for further consideration in view of *Torres.* There is no reason to apply a different rule to this case. Petitions challenged the notice of appeal in their appellate brief, in their petition for rehearing, and in their petition for certiorari. At every opportunity petitioners have argued, correctly, that the notice of appeal does not satisfy the requirements of Federal Rule of Appellate Procedure 3(c).

Torres did not establish a new principle of law either by deciding an issue of first impression or overruling clear past precedent. This is the first question to be considered in dealing with non-retroactivity questions. *Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 106-107, 92 S.Ct. 349, 355-356 (1971). The opinion of this Court clearly states that certiorari was granted to resolve a conflict in the Circuits over the proper interpretation of Federal Rule of Appellate Procedure 3(c). *Torres* specificially provides that it is consistent with prior interpretations of the Federal Rules of Appellate Procedure by this Court. Under these circumstances the Respondents cannot satisfy the first step of the *Chevron* non-retroactivity test. See, *Dasho* v. *Susquehanna Corp.*, 461 F.2d 11, 20-21 (7th Cir.), cert. denied, 408 U.S. 925, 92 S.Ct. 2496 (1972).

The third question posed by *Chevron* would require a court to weigh the possible inequities of retroactive application of a court decision. Since there were conflicting rules in the Circuits, Respondents knew that the issue was not settled and that the notice of appeal they filed might be inadequate. It is therefore, no more inequitable here than in any case presenting an unsettled question to require Respondents to bear the consequences of their decision to file an inadequate notice. See, *Dasho, supra* at 21; *United States* v. *Serfass*, 492 F.2d 338, 395 (3rd Cir. 1974), aff'd, 420 U.S. 377, 95 S.Ct. 1055 (1975).

Although the Respondents argue that the Seventh Circuit followed a long standing position favoring liberal construction of notices filed under Federal Rule of Appellate Procedure 3(c) this overstates the case. In fact, the decision in *Torres* did not overrule any decision of the Seventh Circuit upon which Respondents could have relied when their notice of appeal was filed. This case is not like *Saint Francis College* v. *Al-Khazraji*, U.S. , 107 S.Ct.

2022, 2025-2026 (1987) where the plaintiff relied on a rule clearly established in the Third Circuit. Here, the Seventh Circuit said that even under a liberal view the question presented was "a close one" and the notice of appeal was only "marginally adequate". *Akins* v. *Board of Governors of State Colleges and Universities*, 840 F.2d 1371, 1371-72 n. 1 (7th Cir. 1988). There was actually no strong Seventh Circuit precedent upon which Respondents could have relied in filing an inadequate notice. Even if a full review of this case is not granted, at a minimum, the case must be remanded for reconsideration in view of *Torres*.

II. DOES THE SUMMARY REINSTATEMENT ON APPEAL OF A PENDENT CAUSE OF ACTION VIOLATE THE PRINCIPLES ESTABLISHED BY THIS COURT IN *MINE WORKERS* V. *GIBBS*, 383 U.S. 715 (1966), AND UNFAIRLY JEOPARDIZE THE DEFENSE OF QUALIFIED GOOD FAITH IMMUNITY?

Again, Respondents do not contest Petitioners' argument that a court of appeals may not properly require a pendent state count to be tried together with a single federal count against individuals acting only in their official capacities. Instead, Respondents argue that the court below intended only to reinstate the pendent count for the purpose of its being reviewed by the district court. This is a surprising position for Respondents to take, and represents a form of victory for Petitioners because it amounts to Respondents' agreement to reopen the issue below.

Petitioners contend that the decision whether to exercise pendent jurisdiction is reposed in the first instance in the district courts. See, *Carnegie-Mellon University* v. *Cohill*, ____ U.S. ____, 108 S.Ct. 614, 619 (1988). The Seventh Circuit's decision that the pendent count here "must" be reinstated is in err.

CONCLUSION

Based upon the Petitioners' petition for writ of certiorari and the foregoing arguments and authorities in this Reply, the judgment of the Court of Appeals should be reversed or, at a minimum, this case must be remanded for reconsideration in view of this Court's decision in *Torres*.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Mark T. Dunn, counsel of record, hereby certifies, pursuant to Supreme Court Rule 28.3 and 28.5(c), that three copies of the Reply Brief Of Petitioners on the Petition For A Writ of Certiorari To The United States Court Of Appeals For The Seventh Circuit were served by first class mail, postage prepaid, by mailing on October 10, 1988, upon all parties required to be served. A list of the names and addresses of those parties is:

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